

February 25, 1998

## **Who is the First Amendment For?**

### **A Look at Joe Anchorman, John Q. Public, and the Constitution**

Campaign finance "reform" debates have engaged Congress regularly for a decade. The debate often turns (as it should) to fundamental principles — free speech, fair play, the integrity of the election process. There is, however, one fundamental principle that doesn't get the attention it deserves. Let's call it First Amendment Uniformity.

If Congress were to act on the principle of First Amendment Uniformity, it wouldn't discriminate against the political speech of some speakers and favor others. First Amendment Uniformity would mean that John Q. Public gets the same treatment as the highly paid and vastly influential Joe Anchorman. First Amendment Uniformity is an egalitarian doctrine, and it might guide campaign "reform" legislation if the following resolution were to be adopted:

**"Whereas the First Amendment to the Constitution of the United States says in pertinent part that 'Congress shall make no law abridging the freedom of speech, or of the press,' and**

**"Whereas the First Amendment makes no distinction between the freedom of speech and the freedom of the press,**

**"Now Therefore Be It Resolved that no campaign reform proposal shall be enacted that treats Joe Anchorman's political speech more favorably than John Q. Public's."**

This draft resolution is admittedly casual (the Office of Legislative Counsel could make it more elegant), but the resolution does help frame the underlying questions:

- Is the First Amendment for everyone equally, or are some persons or institutions entitled to special treatment for their political speech?
- Is John Q. Public entitled to the same First Amendment treatment as Joe Anchorman, or is Mr. Anchorman entitled to special treatment because he delivers the news?

Consider the idea of First Amendment Uniformity in the context of a topical example, the Snowe-Jeffords Amendment No. 1647 which is now pending on the Senate floor.

## The Snowe-Jeffords Amendment

The Snowe-Jeffords Amendment [printed at 144 *Cong. Rec.* S 938-39, (2/24/98)]—

- Requires every person or organization who makes an “electioneering communication” in excess of \$10,000 per year to file a statement with the Federal Election Commission (FEC). §200-“(d)(1)” (The term “electioneering communication” is a new term which the amendment defines as a television or radio broadcast that “refers to a clearly identified candidate for Federal office” during the 30 days before a primary election or the 60 days before a general election. §200-“(d)(3)(A)”.)
- The FEC statement must contain, among other things, the name and address of any person who contributed \$500 or more for the communication. §200-“(d)(2)(E)-(F)”. (Senator McConnell and others have pointed out that these disclosure requirements are of questionable constitutionality. See, e.g., *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961), *Bates v. Little Rock*, 361 U.S. 516 (1960), *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).)
- However, news stories, commentaries, and editorials “distributed through the facilities of any broadcasting station” are exempt from its reporting requirements. §200-“(d)(3)(B)(i)”. The pending amendment is not unique in this respect, e.g., 2 U.S.C. §431(9)(B)(i) (1994), nevertheless John Q. Public may well ask why the amendment gives a pass to the rich and powerful Mr. Anchorman. (Another interesting question — but one not addressed here — is how Joe Anchorman can, apparently without shame, editorially endorse “reform” proposals that regulate John Q. Public but leave him and his pals in the institutional media free to speak without having to file with the Federal Government.)

## Does “the Press” Have Special Privileges Under the First Amendment?

Perhaps an exemption for the institutional press is required by the Constitution. See, e.g., *Mills v. Alabama*, 384 U.S. 214, 218-220 (1966). Joe Anchorman will, of course, point to the express language of the First Amendment that forbids Congress to abridge the freedom of the press. But John Q. Public can point to the First Amendment, too, and it prohibits abridgements of the freedom of speech in *exactly the same terms* in which it forbids abridgements of the freedom of the press.

Does the press enjoy First Amendment protections that other citizens do not enjoy? There is one (short) line of decisions that seems to approve of a preferred status for the press. See, e.g., *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). There is a longer (and better) pattern that affirms that all citizens must be treated equally under the First Amendment:

The late Justice William Brennan wrote:

"A distinction [between media speakers and nonmedia speakers] is irreconcilable with the fundamental First Amendment principle that the inherent worth of speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual. . . . We protect the press to ensure the vitality of First Amendment guarantees. This solicitude implies no endorsement of the principle that speakers other than the press deserve lesser First Amendment protection. . . .

"The free speech guarantee gives each citizen an equal right to self-expression and to participation in self-government. This guarantee also protects the rights of listeners to the widest possible dissemination of information from diverse and antagonistic sources. Accordingly, at least six Members of this Court . . . agree today that . . . the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities." *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 781-84 (1985) (Brennan, J., dissenting) (defamation case).

In the same case, Justice Byron White wrote:

"The informative function asserted by representatives of the organized press to justify greater privileges under the First Amendment [is] also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. . . . [T]he organized press has a monopoly neither on the First Amendment nor on the ability to enlighten." *Id.* at 774 n. 4 (White, J., concurring).

First Amendment scholar Rodney A. Smolla has written:

"Is the 'checking function' of the First Amendment a special province of the press, or is it a general citizens' right? In an open culture only one response seems imaginable. Because the participatory interest served by freedom of speech in a democracy grows primarily out of the entitlements of citizens and not the needs of the state, each *individual citizen* must enjoy an undiminished right to join the political fray, to stand up and be counted, to be an active player in the democracy, not a passive spectator." *FREE SPEECH IN AN OPEN SOCIETY* 234-35 (1992).

"*The Supreme Court has been absolutely firm . . . in holding that the press enjoys no special First Amendment privileges not generally applicable to all citizens.* The Supreme Court has rebuffed adoption of a media-nonmedia dichotomy in First Amendment law every time it has been invited to adopt it; indeed, rejection of such a distinction is one of the few areas of modern First Amendment law on which there is substantial consensus among Justices from all jurisprudential viewpoints currently represented on the Court." *Id.* at 397-98, n. 38 (emphasis in original).

## **Congress and the First Amendment**

The status of the press under the First Amendment vis-a-vis other individuals and institutions of American life is a fascinating topic, and the Supreme Court will wrestle with it for another 200 years. There are, of course, arguments on both sides. Former Justice Potter Stewart, for example, thought that the press has a unique standing within the First Amendment. "The publishing business is . . . the only organized private business that is given explicit constitutional protection," he wrote. "If the Free Press guarantee meant no more than the freedom of expression, it would be a constitutional redundancy." "Or of the Press," 26 *Hastings L. J.* 631, 633 (1975).

However, regardless of how the Supreme Court might construe the First Amendment now or in the future, there is no constitutional requirement that Congress discriminate between the press and other speakers. Congress is free — and may constitutionally be required — to treat nonmedia speakers in the same manner as media speakers.

The American public is going to be rightly suspicious of any campaign "reform" that treats Dan Rather better than Joe Sixpack.

## **A Biennial Counterweight to Media Values**

Journalists are vastly more liberal than most Americans, as many studies have shown, and the rising generation is often more liberal still. Columnist and editor William Murchison says, for example, "The rising journalistic generation scorns capitalism and rates Fidel Castro more favorably than Ronald Reagan."

For most of every year, year in and year out, the public is subjected to a steady stream of reporting, analysis, and editorializing from the media. But in the fall of every election year, there arises a temporary counterweight to the media. That counterweight is created by both political parties, political candidates of all sorts, and their supporters and opponents:

"Before October, political dialogue tends to be dominated by the 'free media,' newspapers and television stations, about 90 percent of whose reporters, editors, and producers are Democrats. . . . But in October, the 'paid media' take over — television advertisements, radio spots and direct mail. Both parties start to get their messages out unmediated by the press, and the Republicans begin to do better. And not necessarily because they spend more money: In the Virginia gubernatorial race, the spending was about even until Republican Gilmore pulled ahead and Democrat Beyer, contrary to expectations, declined to dip into his family fortune. . . ." M. Barone, "Our Country, Right or Centrist," *The Weekly Standard*, Nov. 17, 1997, p. 23.

## **John Q. Public's Political Speech Deserves Equal Dignity**

In the case quoted above, Justice Brennan said, "In light of the increasingly prominent role of mass media in our society, and the awesome power it has placed in the hands of a select few, protection for the speech of nonmedia defendants is essential to ensure a diversity of perspectives. Uninhibited, robust and wide-open debate among nonmedia speakers is as

essential to the fostering and development of an individual's political thought as is such debate in the mass media." *Dun & Bradstreet*, 472 U.S. at 784, n. 9.

We live in an egalitarian age — and now we live in an electronic age where each man can be his own publisher and his own video producer. In such an age, it is especially doubtful that the public will allow its First Amendment liberties to be taken away.

John Q. Public thinks he is as entitled to First Amendment protections as Joe Anchorman.

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[Some quotations were edited slightly, *e.g.*, omitting internal quotation marks and citations.]